

# Center for National Security Studies

*Protecting civil liberties and human rights*

Director  
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**Statement of Kate Martin  
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**Before the Subcommittee on Crime, Terrorism, and Homeland Security,  
Committee on the Judiciary of the House of Representatives,**

**on**

**Oversight Hearing of the Department of Justice  
to Examine the Use of Section 218 of the USA Patriot Act**

**Thursday, April 28, 2005**

Thank you, Mr. Chairman, for the honor and opportunity to testify today on behalf of the Center for National Security Studies. The Center is a civil liberties organization, which for 30 years has worked to insure that civil liberties and human rights are not eroded in the name of national security. The Center is guided by the conviction that our national security can and must be protected without undermining the fundamental rights of individuals guaranteed by the Bill of Rights. In our work on matters ranging from national security surveillance to intelligence oversight, we begin with the premise that both national security interests and civil liberties protections must be taken seriously and that by doing so, solutions to apparent conflicts can often be found without compromising either. The Center has worked for more than twenty years to protect the Fourth Amendment rights of Americans to be free of unreasonable searches and seizures, especially when conducted in the name of national security. For example, the Center, then affiliated with the American Civil Liberties Union, was asked to testify before Congress when the Foreign Intelligence Surveillance Act was first enacted. In 1994, when Congress amended the Act to include physical searches, we were again asked to testify about the civil liberties and constitutional implications of that legislation.

We appreciate the role this Committee has taken in connection with the USA Patriot Act, beginning with the work that was done before its enactment to build in protections for civil liberties while the government's surveillance powers were increased. Since its enactment, the

Committee has vigorously pursued information from the Justice Department concerning the use of the Act, and we commend the Committee for now holding this series of oversight hearings.

However, we do not believe that the Congress yet has enough information to make permanent certain key provisions of the Patriot Act, particularly section 218 and those relating to information-sharing. (My testimony today does not address the specific provisions of the Patriot Act relating to information-sharing, sections 203 and 905, as that is the subject of another hearing. However, we do not believe that the Congress yet has adequate information about how the law enforcement community, including the FBI, determines what information about Americans should be shared with the CIA and other intelligence agencies, what specific safeguards exist against abuse, or how the agencies insure that they recognize and act appropriately on important information. For further information, please see the article on section 203 of the Act at [www.patriotdebates.com](http://www.patriotdebates.com).)

The subject of today's hearing is section 218 of the Patriot Act which amended the purpose requirement of the Foreign Intelligence Surveillance Act (FISA) and is sometimes described as having dismantled the "wall" between law enforcement and intelligence. While it is clear that more and better coordination is needed between law enforcement and intelligence on counterterrorism, it is not clear that amending the purpose requirement of the FISA was necessary to achieve that. More importantly, it is not clear whether the government is now using the extraordinary secret search and seizure powers under the FISA in ways that are both effective and consistent with constitutional requirements. The recent case of Brandon Mayfield, the innocent lawyer in Oregon jailed for two weeks, apparently because of his religion, raises serious and unanswered questions. The Committee should demand more information concerning the use of the FISA search and seizure authorities before extending section 218. If section 218 is extended, Congress should amend FISA to protect due process and Fourth Amendment rights.

My testimony today will also discuss the separate but related issue of the relationship between law enforcement and intelligence in investigating Americans and others inside the United States, and the so-called "wall." The Center has long advocated the necessity of tying domestic intelligence authorities to law enforcement to insure that government surveillance is targeted against actual wrong-doers and not against political or religious minorities. As FBI Director Mueller said, "there are no clear dividing lines that distinguish criminal, terrorist and foreign intelligence activity. Criminal, terrorist and foreign intelligence organizations and their

activities are often inter-related or interdependent.”<sup>1</sup> However, the most recent proposal for further intelligence reorganization recommends consideration of establishing a new MI5- like domestic intelligence agency presumably divorced from law enforcement. The recommendation made by the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction to move the FBI’s counterterrorism and counterintelligence operations under the new Director of National Intelligence raises serious questions about moving control of domestic intelligence away from the Attorney General to the DNI. We believe that doing so would be a mistake from the standpoint of both civil liberties and effective counterterrorism.

### **The “Wall” Between Law Enforcement and Intelligence**

The existence of a legal “wall” preventing law enforcement and intelligence agencies from sharing vital information about suspected terrorists is often cited by government officials as the main reason the CIA and FBI didn’t discover and stop the September 11 hijackers.<sup>2</sup> The Justice Department made this argument when it sought to amend the purpose requirement of the Foreign Intelligence Surveillance Act in the Patriot Act and Attorney General Ashcroft repeated it when defending the pre-9/11 intelligence failures before the 9/11 Commission. But the existence of legal barriers to sharing information before 9/11 was highly exaggerated, and even the Justice Department has come to recognize that the real problems were bureaucratic failures of coordination and communication between and within the FBI and CIA.

The term “wall” was used as shorthand for the understanding that the fundamental principles limiting government surveillance of Americans apply differently in the case of law enforcement or intelligence. Such principles include the recognition that there are important consequences for individuals depending on the government’s purpose in initiating surveillance; in particular whether it intends to use the fruits of its surveillance against an individual to prosecute and jail him. They include the teaching of the Fourth Amendment that the best protection against abuse of surveillance powers is to require the government to have some evidence of criminal activity before investigating an individual. Requiring some criminal

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<sup>1</sup> *Oversight of the USA Patriot Act*, Hearings Before the Senate Comm. On the Judiciary, 109 Cong. (Apr. 5, 2005).

<sup>2</sup> Parts of this testimony were adopted from my article on “*Domestic Intelligence and Civil Liberties*,” SAIS Review of International Affairs Winter-Spring 2004, Volume 24, No. 1, available at <http://www.saisreview.org/PDF/24.1martin.pdf>.

predicate for government investigations in turn helps protect citizens from being targeted based on dissent, religion, or ethnicity, and helps to insure that surveillance and intelligence powers are not used for political purposes.

The classic understanding of foreign intelligence gathering -- the collection of information that policymakers need concerning the capabilities and intentions of foreign governments and groups -- is not, however, linked to a criminal predicate. The distinction between the two—investigating possible wrong-doing by individuals and spying on foreign powers— was the fundamental rationale for separating the functions of law enforcement and intelligence agencies. It was also understood that Fourth Amendment rules governing searches and seizures in the United States should be most protective when criminal sanctions against an individual are possible.

Thus, there were separate authorities written to govern law enforcement and foreign intelligence investigations inside the United States. In particular, since 1978, wiretapping to investigate crimes has been governed by one federal statute, while the Foreign Intelligence Surveillance Act (FISA) governs wiretapping “agents of a foreign power” inside the United States for the purpose of gathering foreign intelligence. Similarly, the Attorney General’s Guidelines governing FBI activities, written by Attorney General Levi in 1976 and since amended, provided one set of rules for criminal investigations and another for gathering foreign intelligence relating to espionage or international terrorism inside the United States. These authorities allowed the government much wider latitude in gathering information about Americans and keeping it secret for foreign intelligence purposes than that which is allowed for law enforcement purposes. They also provided much less judicial oversight of the gathering of information for foreign intelligence purposes than for criminal investigations.

While the pre-September 11 framework assumed differences between law enforcement and intelligence, everyone, including the civil liberties community, always recognized the necessity of effective coordination between the intelligence community and law enforcement to fight terrorism.<sup>3</sup> Indeed, for all the talk of a “wall,” the pre-September 11 legal regime acknowledged that terrorism—like espionage, and to a lesser extent international narcotics trafficking—is both

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<sup>3</sup> See, for example, Kate Martin’s September 24, 2001 testimony before the Senate Select Committee on Intelligence on the Legislative Proposals in the Wake of September 11, 2001 Attacks, including the Intelligence to Prevent Terrorism Act of 2001, available at [www.cnss.org/kmtestimony0924.pdf](http://www.cnss.org/kmtestimony0924.pdf).

a law enforcement and intelligence matter. Indeed, no statutory "wall" prohibited sharing information between the law enforcement and intelligence communities; to the contrary, the law expressly provided for such sharing. While the Foreign Intelligence Surveillance Act was interpreted to mean that prosecutors could not direct foreign intelligence wiretaps, as opposed to criminal wiretaps, the text of FISA expressly contemplated that FISA surveillance may uncover evidence of a crime. Before September 11, FISA information had been used in many criminal cases.

Moreover, none of the 9/11 failures were caused by the inability of prosecutors to direct FISA surveillance. The reports of the Congressional Joint Inquiry and 9/11 Commission describe many missed opportunities in detail. Although there were widespread bureaucratic misunderstandings about legal restrictions on information sharing, nowhere do the reports identify any *statutory prohibition* on information sharing as at fault. Instead, the failures resulted from the FBI and CIA failing to know what they knew. For example, while lower level FBI agents had important information about Al Qaeda associates in the United States that they shared with Headquarters, the higher-ups failed to understand the significance of the information, much less act on it. Similarly, the CIA knew for almost two years about the U.S. visa issued to an Al Qaeda suspect who would hijack a plane on September 11, but failed to inform the FBI or appreciate the importance of the information. This was a failure of analysis and coordination; it was not caused by legal restrictions on access to information.

### **The Patriot Act and Section 218.**

Before September 11, it was understood that if the government started out with the primary purpose of making a criminal case against an individual, it must use the criminal surveillance authorities, not FISA.<sup>4</sup> In the Patriot Act, the Justice Department asked Congress to repeal the fundamental requirement in FISA that its secret and extraordinary procedures be used only when the government's primary purpose is to collect foreign intelligence. Through section 218 of the Patriot Act, the Justice Department sought to allow the use of FISA's extraordinary powers when the government targets an individual for criminal prosecution or otherwise as long as foreign intelligence gathering was a significant purpose of the surveillance. Of course, since

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<sup>4</sup> But see *In re: Sealed Case No. 02-001*, Foreign Intelligence Surveillance Court of Review, 18 November 2002.

FISA only applies when there is probable cause that the target is an “agent of a foreign power” or foreign power, the significant purpose requirement will always be met when the other statutory requirements are met. (FISA authorizes surveillance of all individuals in the United States, both U.S. persons and non U.S. persons who meet the definition of “agent of a foreign power.”)

In seeking section 218, the Department complained that FISA barred the sharing of information with prosecutors and law enforcement investigators. However, even if legal rather than bureaucratic obstacles existed to sharing information, Congress could have adequately addressed the problem simply by providing that FISA information could be shared with law enforcement personnel, as it did explicitly in section 504 of the Patriot Act. This provision alone – proposed by Senator Leahy, not the Justice Department – would have addressed whatever confusion existed about the FISA requirements at the FBI and elsewhere.

But the Patriot Act goes much further. Section 218 repeals the requirement that foreign intelligence gathering be the primary purpose when initiating FISA surveillance. Thus, the government is now free to use the broad powers in FISA to conduct secret surveillance on Americans with the intention of bringing criminal charges against them, or simply to collect information about them as long as there is probable cause that the individual is an agent of a foreign power.

In evaluating the effect of section 218, it is important to begin with a description of FISA authorities. The FISA statute authorizes secret surveillance on less probable cause of criminal activity than is authorized by the Fourth Amendment in criminal investigations. Moreover, FISA contains many fewer safeguards against abuse because there is no *post* surveillance check on either the legality of the initial warrant or on how the surveillance was conducted. While the Justice Department claims that there are judicial oversight and probable cause requirements built into FISA, there is no dispute that in most instances the government will never have to inform an American that his conversations were overheard, his house searched or his DNA seized pursuant to FISA. The statute only requires the government to inform Americans targeted by FISA wiretaps or searches of those searches if they are subsequently criminally indicted and the government tries to use the fruits of the searches against them. The statute also *permits*, but does not *require* the Attorney General to determine that there is no national security interest in continuing secrecy about the search of a U.S. person’s home and then to inform that individual that his house was searched. 50 U.S.C. sec. 1825(b).

Even in those few cases where an individual is informed that he or she has been the target of FISA searches and seizures, the Attorney General always blocks access to the original application for the FISA warrant. See 50 U.S.C. secs. 1806(f) and 1825(g). Thus, there is no opportunity for a target to challenge the search and obtain adversarial, rather than *ex parte*, judicial review of the adequacy and legality of the search, because the original application for a FISA warrant, unlike a criminal warrant application, is always withheld from the target.

#### Unanswered questions concerning the use of FISA.

While the Justice Department continues to claim that the change in FISA's purpose requirement in section 218 is necessary to allow it to use FISA information in criminal prosecutions, its claims raise more questions than they answer. For example, the Department cites prosecutions of individuals based on FISA information obtained from surveillance conducted before the Patriot Act as evidence of the usefulness of section 218.<sup>5</sup> The Department, however, has provided no explanation about why section 504 is not sufficient to provide full authority for sharing all FISA information with prosecutors. Section 218's change to the purpose requirement would seem irrelevant to such sharing. This would seem especially true, of course as to the sharing of FISA surveillance conducted before section 218 changed the purpose requirement.

The second unanswered question concerns the effect of section 218 to allow the government to use the secret authorities in FISA in criminal cases instead of the usual Fourth Amendment warrants which contain greater protections. The Justice Department has offered no public explanation for why and when it decides to use the secret authorities of FISA, rather than the usual criminal authorities. This question is especially important as the extraordinary procedures of FISA are available not just for matters involving international terrorism. The statute also allows the use of secret searches and seizures against Americans in investigations of "clandestine intelligence gathering" on behalf of a foreign government, which might well include legal activities such as preparing non-public reports for foreign governments or groups.

Similarly, the Department's description of its use of FISA surveillance pursuant to section 218 in the case of the "Portland Seven" again raises more questions than it answers.

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<sup>5</sup> See Justice Department, USA Patriot Act: Sunsets Report, April 2005, in particular concerning the case of Sami Al-Arian.

While the Department claims that section 218 allowed it to postpone arresting one individual in order to continue the investigation and arrest six more people, it provides no explanation about how the law worked to effect that result. To the contrary, missing from this explanation is any acknowledgement that the Department has the authority to postpone notice of *criminal* wiretap surveillance and physical searches and seizures until it is able to identify and arrest other conspirators. Indeed section 213 of the Patriot Act – the so-called sneak and peak authority -- explicitly codifies that authority to delay notification of criminal searches and seizures. The Justice Department has said nothing about why they could not have used the delayed notice authority in section 213 and Title III of the wiretap statute to accomplish the same result in the Portland Seven case.

Moreover, in order to fully evaluate section 218, it is important to consider the broader context of the secret wiretap and surveillance authority in the FISA. The recent revelations concerning the secret search of Brandon Mayfield's home raise serious unanswered questions about possible abuse of the FISA authorities. Mayfield, a Muslim lawyer in Portland, Oregon was jailed for two weeks, without charges, on what turned out to be the false claim that he had material information concerning the March 11, 2004 terrorist bombing in Madrid. After he was released the FBI apologized for jailing an innocent person. In the course of investigating Mr. Mayfield, the FBI apparently obtained a warrant under the FISA to secretly search his home and seize copies of his documents, computer files and his DNA. Apparently, the FBI also secretly wiretapped his phone and e-mail. There is ample evidence that the FBI carried out the searches and seizures with the intention of jailing and prosecuting Mr. Mayfield. While the Inspector General is now investigating the case, including presumably how the FBI came up with a suspect who was Muslim based on a misread fingerprint, the Congress needs to undertake its own investigation, in particular on the use or abuse of the FISA authorities. There is no way to know how many other innocent Americans have had their houses searched or their phones tapped based on allegations resting on their religion. The search of Mr. Mayfield's home is an example of the dangers of FISA. Those dangers are increased by section 218 (regardless whether that section played a role in that particular search) because by making FISA surveillance more easily obtainable, section 218 makes it likely that a lot more people will be secretly searched. And the attendant secrecy raises the specter that the government will as it did

in the Mayfield case – go after an innocent American. Under current law, there is no way to know how many Americans have been subject to such surveillance, or how many more will be.

At a minimum, Congress should obtain the answers to all these questions before extending section 218. The Committee should make arrangements to review the FISA applications – at least for U.S. persons – under secure circumstances. The Committee should investigate the use of FISA searches and seizures when the purpose of the investigation is to target individuals for criminal prosecution or deportation. The Committee should also investigate what protections exist against using protected First Amendment activities, including religious beliefs and political activities, as the basis for FISA surveillance. While the details of particular FISA applications are of course classified and cannot be publicly disclosed, there is much information concerning the law and its application which can be disclosed and needs to be publicly discussed before Congress extends section 218.

#### Needed Amendments.

Should the Congress determine to extend section 218 for an additional period of time, it should consider adopting two amendments to provide some minimal safeguards. The amendments are needed to protect the Fourth Amendment rights of individuals whose homes are secretly searched, and whose papers and DNA are secretly seized, but who turn out not be spies and terrorists and to protect the due process right of those the government seeks to prosecute and imprison based on the results of such secret searches and seizures.

Under current law, the government is required to notify an individual that he has been targeted under FISA only when it seeks to use the information against him. Mr. Mayfield is apparently the only individual ever notified by the government that he had been the target of a FISA search, who the government was not seeking to prosecute or deport. While it is not clear why he was informed, it is likely that the government did so only because it had wrongly imprisoned him and is now being sued for that act. While the FISA refers to the Attorney General determining that there is no national security interest in continuing secrecy about the search of a U.S. person's home, the Justice Department claims that no court may compel it to inform an individual of a search in those circumstances. *See* Mar. 24, 2005 letter from Justice Department to Mr. Elden Rosenthal, referring to 50 U.S.C. § 1825(b).

Even when an individual is notified because he has been indicted, the government is not required to disclose anything more than the existence of the FISA surveillance unless it either seeks to introduce FISA information into evidence or the information is required to be disclosed to the defendant under the Brady exculpatory evidence rule. And then, all the government provides to the defendant is a record of his own telephone conversations or a copy of his own papers. See FISA, 50 U.S.C. §§ 1806(c), 1825(d). (Even these minimal protections are only available to individuals *not* alleged to be “alien terrorists.” See 8 U.S.C. § 1534(e). ) The government is not required to disclose and, it appears, has never disclosed the application for a FISA warrant to anyone. Indeed, information obtained under FISA is accorded much greater secrecy than any other kind of classified information is accorded under the Classified Information Procedures Act or, in our view, than is consistent with constitutional due process requirements.

If Congress extends section 218, allowing secret surveillance when the government’s primary purpose is *not* foreign intelligence gathering, but rather making a criminal case against an individual, Congress should consider how to bring the use of FISA information in line with basic due process requirements. One way to do this would be to treat FISA information like all other kinds of classified information by making it subject to the provisions of the Classified Information Procedures Act. Such a provision is included in the Civil Liberties Restoration Act, H.R.1502, sec. 401. Under current law, it is nearly impossible for a defendant to contest the introduction of FISA evidence against him because the government’s application for the FISA search and related materials are automatically kept secret. That should be changed so that when FISA evidence is used in criminal cases, the court may disclose the application and related materials to the defendant or his counsel, with any necessary redactions, in accordance with the Classified Information Procedures Act. (Sources and methods information for example, might be withheld.) Such an amendment would offer a balanced and effective way to protect both sensitive national security information and the due process rights of individuals.

Congress should also consider amending the FISA to protect the Fourth Amendment rights of those whose homes are searched and conversations are overheard, but who turn out not to be terrorists or spies. There is no requirement under current law that the government inform innocent persons whose conversations are overheard, houses are searched and belongings are seized that the FBI was in their home and listening to their conversations. There is no after-the-

fact check on the propriety of the search. An innocent individual never gets a chance to challenge the search, only one who is subsequently indicted. And with the repeal of the purpose requirement in section 218, the number of FISA searches has been steadily increasing.

A fundamental requirement of the Fourth Amendment is that an individual be notified of the government's search and seizure and Congress should take one small step to restore this constitutional protection to those who are targeted for secret searches and turn out to be innocent. Congress should consider amending the FISA so that, if it turns out that the person whose house was searched (and whose conversations or e-mail were intercepted) was not a terrorist or a spy, the individual would be told after some reasonable period of time that the government had searched his belongings and be given an inventory of what was taken. This could be done by amending 50 U.S.C. § 1825(b) to require the Attorney General when certain criteria are met to notify all those who were subject to FISA searches or seizures. Those criteria should include the passage of a definite time period and the determination that there is no current probable cause that the target is in fact an "agent of a foreign power." Doing so would restore Fourth Amendment protections and provide some measure of accountability for secret searches of Americans' homes.

### **Domestic Intelligence Reorganization Proposals**

In enacting the recommendations of the 9/11 Commission regarding the reorganization of U.S. intelligence agencies, the Congress accepted its conclusion that a new domestic MI5 or CIA should not be created. There has been a broad consensus among both civil libertarians and intelligence officials that the responsibility for intelligence activities inside the United States should ultimately remain with the Attorney General as the chief law enforcement officer rather than with an intelligence official. As former intelligence and national security officials, including former DCI Robert Gates, John Hamre and Sam Nunn urged, "[e]ven as we merge the domestic and foreign intelligence we collect, we should not merge responsibility for collecting it ... exclusive responsibility for authorizing and overseeing the act of domestic intelligence collection should remain with the Attorney General. This is the only way to protect the rights of the American people upon whose support a strong intelligence community depends."<sup>6</sup>

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<sup>6</sup> Center for Strategic and International Studies, *Guiding Principles for Intelligence Reform*, at 2 (Sept. 21, 2004), at [http://www.csis.org/0409\\_intelreformprinciples.pdf](http://www.csis.org/0409_intelreformprinciples.pdf).

In the Intelligence Reform and Terrorism Prevention Act of 2004, the Congress set up a National Counterterrorism Center to insure sharing of information and coordination of plans, but agreed that ultimate responsibility for domestic operations should remain with the Attorney General. However, the most recent review done by the Silberman-Robb Commission has recommended that the counterterrorism and counterintelligence operations of the FBI be moved under the direct supervision of the new Director National Intelligence. Such a recommendation, if adopted, would make use of counterterrorism's most effective domestic tool – the ability to prosecute and jail terrorists more difficult. By separating domestic terrorism and counterintelligence from law enforcement, it could create new and more difficult coordination problems. Indeed the Commission also recommends the reorganization of national security responsibilities at the Justice Department, but does not explain how those prosecutorial efforts under the supervision of the Attorney General would be coordinated with a reorganized FBI carrying out the intelligence and investigations necessary to bring prosecutions under the supervision of the new NDI rather than the Attorney General. In making its recommendation, the Commission also overlooks the fundamental differences in intelligence at home and abroad and risks resurrecting all the bureaucratic difficulties attributed to the “wall” that law enforcement and intelligence agencies have been working to dismantle since September 11. Such a change is likely to threaten civil liberties.

*Differences between intelligence at home and abroad.* The Attorney General, unlike an intelligence director, has an institutional responsibility to protect constitutional rights and is subject to closer and more transparent congressional scrutiny. As William Webster, former director of both the FBI and CIA, testified last August concerning proposals to transfer the FBI's domestic intelligence authorities from the Attorney General to an intelligence official, “the FBI should take its guidance from the Attorney General on its dealings with U.S. persons and the manner in which it collects information in the United States. This has been an important safeguard for the American people, should not be destructive of effective operations, and avoids the risks of receiving vigilante-type instructions, whether from the intelligence community or the White House.”<sup>7</sup>

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<sup>7</sup> Testimony of William H. Webster before the Senate Committee on Governmental Affairs, *Reorganizing America's Intelligence Community: A View From the Inside* (Aug. 16, 2004), at 8, available at [http://hsgac.senate.gov/\\_files/081604webster9934.pdf](http://hsgac.senate.gov/_files/081604webster9934.pdf).

Historically, overseas intelligence was largely carried out by the CIA (and Defense Department agencies) while the FBI was largely responsible for domestic intelligence because there are important differences between the missions and methods that are necessary and appropriate abroad and at home. These differences should not be disregarded by the simplistic device of labeling these different activities in the U.S. and abroad as “intelligence.” Generally, the CIA has been confined largely to gathering foreign intelligence abroad for policymakers regarding the intentions and capabilities of foreign powers or groups. The FBI has had both law enforcement and intelligence responsibilities inside the United States, for both counter-espionage and international terrorism matters. While both involve intelligence, the difference in functions is important from the standpoint of civil liberties.

The CIA acts overseas, in secret, and its mission includes violating the laws of the country in which it is operating when necessary. It is charged with collecting information overseas without regard to individual privacy, rights against self-incrimination, or requirements for admissibility of evidence. It is also tasked with carrying out covert actions to influence events by whatever means the President authorizes. The agency gives the highest priority to protection of its sources and methods.

In contrast, the FBI, as an agency with both intelligence and law enforcement responsibilities, must *always* operate within the law of the jurisdiction in which it is operating, even when outside the U.S. It must respect the constitutional limits set by the First Amendment, the Fourth Amendment and due process on government activities inside U.S. borders, which limits have not (yet) been extended to aliens overseas.<sup>8</sup> While the task of foreign intelligence is to learn as much as possible to provide analyses to policymakers, deepseated notions of privacy rooted in the Constitution limit the information the government may collect and keep about Americans. There is much greater transparency of the FBI’s operations, in part because they affect Americans and in part because they are likely to lead to prosecutions, with the result that information which is collected must generally be admissible as evidence at trial and the methods and informants used are quite likely to be publicly identified.

Examining how intelligence information is actually used in counterterrorism demonstrates the necessity of tying intelligence activities inside the U.S. to a law enforcement

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<sup>8</sup> While international human rights law provides many of the protections recognized in the Bill of Rights and is not limited by national borders, its applicability to intelligence activities in times of emergency or war is less developed.

agency. The first use of “intelligence” information is to identify and locate individuals involved in planning terrorist acts. This information must then be used to prevent the attack, in ways that are legally permissible. Potential terrorists found in the United States may be placed under intensive surveillance. They may be apprehended if there is probable cause that they are engaged in criminal activity or are in the United States in violation of the immigration laws. They may be arrested not only for plotting terrorism, including attempt or conspiracy, but for any crime or visa violation. The government may also attempt to turn them into informants on their associates (with or without arresting them), but may not blackmail them to do so. Ultimately, in order to disable individuals from future terrorist activity, they have to be arrested and prosecuted. (They may also be deported.) Such “prevention” through prosecution has remained one of the government’s major anti-terrorism tools even since September 11. Such an approach focuses on individuals involved in planning criminal activities and ultimately relies on law enforcement authorities.<sup>9</sup>

Whereas the FBI must arrest and charge individuals in the U.S. consistent with due process, the CIA and DoD intelligence agencies operating overseas are free to employ methods such as disinformation campaigns, secret kidnappings, and interrogations. The methods used by the CIA and foreign intelligence agencies to “disable” terrorists – predator drones shooting missiles at a car crossing the desert; turning individuals over without any legal proceedings to intelligence services infamous for coercive interrogations; or indefinitely detaining individuals incommunicado without any legal process – have never been deemed constitutional or appropriate to use against individuals in the United States. Even absent military hostilities, overseas intelligence methods include disruption of groups and harassment of individuals using agent provocateurs, blackmail or other means, which have not been allowed in the United States.

Moreover, counterterrorism intelligence inside the United States poses special risks to civil liberties. It is always difficult to investigate planned terrorist activity without targeting those who may share the religious or political beliefs or the ethnic backgrounds of the terrorists, but do not engage in criminal activity. It is easier for an agency to identify those who share the

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<sup>9</sup> As the 9/11 Commission recognized: “Counterterrorism investigations in the United States very quickly become matters that involve violations of criminal law and possible law enforcement action. Because the FBI can have agents working criminal matters and agents working intelligence investigations concerning the same international terrorism target, the full range of investigative tools against a suspected terrorist can be considered within one agency.” NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 424 (2004).

political goals or religious fanaticism of terrorists than to identify and locate those actually plotting harm. It is therefore crucial to structure bureaucratic rules and incentives to discourage investigations based on political and religious activities and to require focusing on finding actual terrorists. An important means for doing this is to require agencies to focus on criminal activity, which encompasses all terrorist plotting and financing, rather than authorizing an intelligence approach that absorbs all available information about thousands of individuals in the hope of finding something useful. A second important safeguard is the transparency inherent in a law enforcement agency ultimately answerable to the courts – transparency to which the CIA, as an intelligence agency, has never been subjected.

While questions have been raised concerning the effectiveness of various FBI efforts, those issues do not undercut the importance of tying domestic intelligence efforts to a law enforcement agency. Similarly, the fact that it is important to assure effective coordination between intelligence activities overseas and those in the U.S. does not argue for any separation of domestic intelligence activities from related law enforcement activities. Indeed, even as the 9/11 Commission recommended new structures to insure coordination, it agreed that the FBI, not the CIA, should retain domestic intelligence responsibilities. “The FBI’s job in the streets of the United States would thus be a domestic equivalent, operating under the U.S. Constitution and quite different laws and rules, to the job of the CIA’s operations officers abroad.”<sup>10</sup>

Given the importance of maintaining different laws and rules for the collection of intelligence on Americans than for the collection of intelligence overseas, the Attorney General should remain ultimately responsible for the FBI’s operations. Putting an Intelligence Director or Office in charge of domestic intelligence will exacerbate the difficulties in reconciling the different approaches that are required in the U.S. and overseas. We note that the Silberman-Robb Commission did recommend that the rules for domestic intelligence should still be written by the Attorney General, but we suggest that such a division of responsibility – between an Attorney General who writes rules for intelligence and counterterrorism operations, but has no responsibility for how those rules are carried out and a Director of National Intelligence who has responsibility for how operations are carried out, but no responsibility for writing the rules-- makes no sense. We respectfully suggest that the DNI should have responsibility for insuring coordination between domestic and foreign collection and for setting overall strategic priorities

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<sup>10</sup> 9/11 COMMISSION REPORT, at 423.

for domestic intelligence collection, while domestic intelligence operations should remain operationally tied to law enforcement.

In conclusion, let me reiterate our appreciation for the Committee's hard work on these difficult problems that are important for both our liberty and our security. We look forward to working with you in the future and stand ready to provide whatever assistance we can.